

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 15 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALFREDO VARGAS-OCHOA,

Defendant - Appellant.

No. 05-10677

D.C. No. CR-05-00016-MHM

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Arizona
Mary H. Murguia, District Judge, Presiding

Submitted September 11, 2006^{**}

Before: PREGERSON, T.G. NELSON and GRABER, Circuit Judges.

Alfredo Vargas-Ochoa appeals from the district court's judgment imposing a 60-month sentence following his guilty plea to illegal reentry after deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Vargas-Ochoa contends that the district court committed plain error by relying only on the presentence report to apply a 16-level enhancement for his prior conviction for first degree residential burglary, in violation of California Penal Code §§ 459, 460. Specifically, Vargas-Ochoa contends that the government failed to provide sufficient evidence to demonstrate that his prior conviction was a crime of violence under United States Sentencing Guidelines § 2L1.2. We agree.

Because the statute of conviction is broader than the definition of a “crime of violence,” *see United States v. Rodriguez-Rodriguez*, 393 F.3d 849, 852 (9th Cir. 2005), and there were no judicially-noticeable documents relied upon by the district court that established a crime of violence under § 2L1.2(b)(1)(A), *see Shepard v. United States*, 544 U.S. 13, 26 (2005), application of the 16-level enhancement was plain error. *See United States v. Pimentel-Flores*, 339 F.3d 959, 968 (9th Cir. 2003). The government will have the opportunity at resentencing to offer additional judicially-noticeable evidence to support the enhancement. *See United States v. Navidad-Marcos*, 367 F.3d 903, 909 (9th Cir. 2004).

SENTENCE VACATED and REMANDED.